UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 38 | Number 3 Article 4

4-1-1960

Notes and Comments

North Carolina Law Review

NOTES AND COMMENTS

Administrative Law—Constitutional Law—Delegation of Nonjudicial Duties to the North Carolina Superior Courts

Milk Commission v. Galloway[1] inferentially raises a problem concerning the delegation of nonjudicial duties to the North Carolina Superior Courts. Galloway was a milk producer adversely affected by an order issued after hearing by the Milk Commission fixing the rates for hauling milk from producer to distributor in several counties. Galloway, who had received notice of the hearing, did not attend but appealed from the order to the superior court. Pursuant to the North Carolina Milk Commission Act,[2] that court heard the matter de novo and issued its own rate order which conformed to the Commission's order.[3] The North Carolina Supreme Court affirmed, holding the Milk Commission Act constitutional as applied.

It is well settled, since the leading case of *Nebbia v. New York*,[4] that a state legislature in the exercise of the police power can regulate the price of milk through an administrative board. The transportation rates in the principal case were an increment of the price of milk and thus within the area of regulation constitutionally granted to the Milk Commission.

The court in the principal case stated that the appellant attacked the power of the superior court to fix the transportation rates. An examination of the record on appeal, however, reveals that appellant's argument was not based on the theory that the superior court was exercising nonjudicial duties, but rather that the particular rates in question were not authorized by the act. The court noted the appeal provision of the act,[5] describing it as a "sedulous protection against abuse of power by the Milk Commission," and concluded, "[W]e hold that the Milk Commission, and the *Superior Court* on appeal, *had the power . . . to regulate and to fix transportation rates*"[6] for the hauling of milk in North Carolina.

[1] 249 N.C. 658, 107 S.E.2d 631 (1959).

[2] N.C. GEN. STAT. §§ 106-266.6 to -266.21 (Supp. 1959).

[3] Biltmore Dairies, distributor, had assigned its producers to routes served by its trucks and charged the producers for transporting the milk from the farm to the plant according to the average cost per cwt. on each route. The costs varied from about seventeen cents per cwt. to about thirty-one cents per cwt. depending upon the route. The average cost per cwt. for all milk transported was twenty-six cents. The orders of both the Commission and the court decreed that Biltmore in the future use the overall average cost per cwt. (here twenty-six cents) as the basis of its hauling charge to the producers.

[4] 291 U.S. 502 (1934).

[5] N.C. GEN. STAT. § 106-266.17 (Supp. 1959).

[6] 249 N.C. at 667, 107 S.E.2d at 638. (Emphasis added.)

This language of the court points toward two interpretations of the function of the superior court: first, that it is to guard against the abuse of power by the Milk Commission, and second, that it may itself fix rates and otherwise regulate the milk industry. Guarding against the abuse of power by an administrative board is a traditional function of the courts.[7] The fixing of rates is usually held not to be a judicial function.[8]

> A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative not judicial in kind . . . .[9]

Nonjudicial duties in certain instances have been delegated to the courts both directly and indirectly. An example of the direct grant of nonjudicial duties to a court is found in *State v. Hurber*,[10] where a statute that authorized courts of record in West Virginia to hear proceedings for the revocation of beer licenses was found to give the courts legislative power and was declared unconstitutional. A direct imposition of a nonjudicial function such as deciding whether a beer license should be revoked is obvious enough. An indirect method of imposition where, as indicated by the principal case, the court's scope of review of administrative action is enlarged by statute is not so easily recognized. The Connecticut court, recognizing this latter type of imposition, has limited the review of administrative action to the single question: "Did the board act illegally?"[11]

Several states whose constitutional provisions concerning the separation of governmental powers are basically the same as those in the

[7] "The court has inherent authority to review the discretionary action of any administrative agency, whenever such action affects personal or property rights, upon a *prima facie* showing . . . that such agency has acted arbitrarily, capriciously, or in disregard of law." *In re* Wright, 228 N.C. 584, 587, 46 S.E.2d 696, 698 (1948). For a discussion of the function of the courts in reviewing administrative action see DAVIS, ADMINISTRATIVE LAW §§ 244-57 (1951).

[8] *But see* People v. Willcox, 194 N.Y. 383, 87 N.E. 517 (1909), where rate fixing was held to be a judicial function.

[9] Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 226 (1908) (Holmes, J.). See also Administrative Procedure Act § 2(c), 60 Stat. 237 (1946), 5 U.S.C. § 1001 (1958).

[10] 129 W. Va. 198, 40 S.E.2d 11 (1946).

[11] "On an appeal from an administrative board . . . the function of the court is to determine whether or not it acted illegally . . . . Where upon an appeal the court hears evidence it is solely for the purpose of determining that question . . . ; even where a statute required that an appeal should be tried de novo, we held that the court should make an independent inquiry into the facts but only for the purpose of exercising that function." Jaffe v. State Dep't of Health, 135 Conn. 339, 353-54, 64 A.2d 330, 337-38 (1949).

North Carolina Constitution have considered the problem of delegation of nonjudicial duties to the courts. There is a wide diversity of opinion, however, as to what duties may be delegated to state courts. In the field of local government it has been held that courts may be empowered to grant certificates of incorporation to municipalities,[12] determine the existence of facts which would warrant the creation of a water district,[13] erect and divide political subdivisions,[14] and appoint persons to investigate county and municipal affairs.[15] Whether the foregoing functions may be classified as judicial is seriously doubted. On the other hand, courts cannot be authorized to determine if the annexation of an area was in the public interest or convenience,[16] or to fix, within certain limits, the salaries of the court's medical officer, probation officer, and secretarial staff.[17] In the field of utility regulation it has been held that the courts could not fix rates,[18] or otherwise regulate utilities;[19] yet one decision has intimated that courts can perform these duties.[20] It is generally held that courts may not issue licenses for the operation of a business;[21] however, it was held constitutional for the lower Georgia courts to grant liquor licenses.[22]

When called upon to exercise a nonjudicial function, some courts have felt constrained by the exigencies of the particular case to perform the inappropriate duty. For example, in *In the Matter of Town of Chesapeake*[23] many towns had been incorporated by the West Virginia circuit courts under a statute that authorized those courts to issue a certificate of incorporation upon the petitions of local citizens. The appellate court recognized that the circuit courts were performing patently nonjudicial duties; however, it upheld the statute on grounds of public policy to avoid rendering doubtful the legal existence of many towns.

[12] In the Matter of Town of Chesapeake, 130 W. Va. 527, 45 S.E.2d 113 (1947).
[13] Culley v. Pearl River Industrial Comm'n, 234 Miss. 788, 108 So. 2d 390 (1959).
[14] In the Matter of Borough of Pottstown, 187 Pa. Super. 313, 144 A.2d 623 (1958) (Court of Quarter Sessions had performed this function since the earliest days of the Commonwealth.).
[15] Massett Bldg. Co. v. Bennett, 4 N.J. 53, 71 A.2d 327 (1950).
[16] Ritche v. City of Brookhaven, 217 Miss. 860, 65 So. 2d 832 (1953).
[17] State *ex rel.* Richardson v. County Court of Kanawha County, 138 W. Va. 885, 78 S.E.2d 569 (1953).
[18] Public Serv. Comm'n v. City of Indianapolis, 235 Ind. 70, 131 N.E.2d 308 (1956).
[19] Iowa-Illinois Gas & Elec. Co. v. City of Fort Dodge, 248 Iowa 1201, 85 N.W.2d 28 (1957).
[20] Florida Power Corp. v. Pinellas Util. Bd., 40 So. 2d 350 (Fla. 1949) (dictum).
[21] Langen v. Badlands Co-op. State Grazing Dist., 125 Mont. 302, 234 P.2d 467 (1951); Peterson v. Livestock Comm'n, 120 Mont. 140, 181 P.2d 152 (1947); State v. Hurber, 129 W. Va. 198, 40 S.E.2d 11 (1946).
[22] Carrol v. Wright, 131 Ga. 728, 63 S.E. 260 (1908).
[23] 130 W. Va. 527, 45 S.E.2d 113 (1947).

Another factor has influenced courts which have accepted nonjudicial duties. Under the doctrine of separation of powers a spirit of co-operation must exist between the branches of government in order for the parts to function as a whole. At times, therefore, the courts have acted as legislative agents. In New Jersey the court did so by appointing persons to investigate corruption at the local level. In holding the delegation valid, the court stated,

> A legislative request . . . for the judiciary to act with respect to any particular subject matter is not to be lightly declined and such matters are to be passed upon . . . in the spirit of comity that should prevail between the three branches of government.[24]

It is difficult to ascertain North Carolina's position on the performance of nonjudicial duties by its superior courts. The only case directly concerned with this point, *In re Wright*,[25] held that the superior court could conduct a trial de novo in reviewing the discretionary suspension of a driver's license. The court recognized that the inherent authority of the courts in reviewing administrative action[26] had been enlarged by the provision for this statutory appeal and found "that the Legislature had full authority to impose this additional jurisdiction upon the courts . . . ."[27] Then the supreme court stated that this jurisdiction did not constitute a delegation of legislative or administrative authority and that the superior court could not substitute its discretion for that of the administrative body, thus implying that such a delegation would be invalid. The court held that discretion to revoke was not in the superior court which determined only whether the license was *subject to revocation.* If so, the superior court does not decide whether or not to revoke but affirms the administrative determination.

It is submitted that the Milk Comimssion Act, as interpreted in the principal case, may have unwittingly provided through the appellate process a procedure whereby nonjudicial functions are imposed on the superior courts. This cannot be reconciled with the constitutional separation of the legislative, executive, and judicial powers.[28] The superior courts are not the proper bodies for the regulation of an industry in the first instance, and the function should not be assumed on appeal. Neither comity between the branches of government nor the exigencies of regulating the price of milk require the imposition of such an inappropriate burden upon the crowded dockets of our superior courts. The General Assembly might well consider rewording

[24] Massett Bldg. Co. v. Bennett, 4 N.J. 53, 61, 71 A.2d 327, 331 (1950).
[25] 228 N.C. 584, 46 S.E.2d 696 (1948).
[26] See note 7 *supra.*
[27] 228 N.C. at 587, 46 S.E.2d at 698.
[28] N.C. CONST. art. I, § 8; art. II, § 1; art. III, § 1; art. IV, § 2.

the appeal provision of the Milk Commission Act[29] to prevent such an occurrence. The appeal provisions of the Virginia Milk Commission Act[30] limit the court to determining if the order appealed is within the discretion vested in the Commission, and if so, whether the Commission has exercised a reasonable discretion or the order is unreasonable or capricious. Legislative action would not be required, however, if the supreme court were to adopt the Connecticut court's concept of the purpose of a trial de novo on appeal from an administrative body[31] and limit the superior courts to the determination of the single question: "Has the Commission acted illegally?"

G. DUDLEY HUMPHREY, JR.

Bankruptcy—Survival of Liability for Willful and Malicious Injury

The Bankruptcy Act[1] operates as a discharge or release of a bankrupt from all his debts which are provable in bankruptcy, except such as are excepted in the act, and has as its purpose to relieve the honest debtor from the weight of oppressive indebtedness with leave to start afresh.[2] Where the liability or debt is the result of a judgment arising out of automobile accidents the idea of discharge has met with considerable criticism. This criticism may be illustrated by the language of a New York case where it was said:

> If the court were permitted to do moral justice instead of legal justice it would refuse to discharge the bankrupt of the judgments. There are too many accidents resulting in judgments which are wiped out in bankruptcy. The practice has grown up wherein a person will negligently operate his automobile and then when a judgment for such injuries is rendered against him, will obtain the protection of the Bankruptcy Law by filing a voluntary petition in bankruptcy . . . . Operators of automobiles may drive in a careless and negligent manner and go unscathed of justice by filing a petition in bankruptcy.[3]

Although liabilities which are the result of willful and malicious injuries to person or property are not dischargeable in bankruptcy,[4] the courts are by no means in accord as to what constitutes willful and malicious conduct. Most of the cases seem to lie between the areas

[29] N.C. GEN. STAT. § 106-266.17 (Supp. 1959).
[30] VA. CODE §§ 3-369 to -371 (1950).
[31] See note 11 *supra*.

[1] Bankruptcy Act, ch. 541, 30 Stat. 544 (1898), as amended by 66 Stat. 420 (1952), 11 U.S.C. §§ 1-1086 (1958).
[2] Williams v. U.S. Fid. & Guar. Co., 236 U.S. 549 (1915).
[3] Francine v. Babayan, 45 F. Supp. 321, 322 (E.D.N.Y. 1942).
[4] Bankruptcy Act ch. 541, § 17, 30 Stat. 550 (1898), 11 U.S.C. § 35 (1958).

where the injury is produced by ordinary negligence and where it is the result of a deliberate and intentional wrongdoing. A majority of cases have decided that no degree of negligence can produce a willful and malicious injury.[5] This view is buttressed by the theory that exceptions tend to impair the bankrupt's remedy, and that since the statute is highly remedial, these exceptions should be so construed as to affect that remedy only so far as is necessarily required by its express terms.[6] The modern trend, however, favors the interpretation that "willful and malicious injuries to the person," as used in the act, does not necessarily connote ill will or special malice, but describes a wrongful act done in utter disregard of the legal rights of others and without just or lawful support, evidencing a reckless disregard and indifference to the safety of human life resulting in injury to the person or property of another. This view is based on the theory that bankruptcy should not be allowed to function as a refuge for reckless drivers.[7]

It appears that North Carolina would follow the modern trend. Our court has considered the question of what is willful and malicious in deciding cases under our civil arrest statute[8] and in cases involving punitive damages. In a case[9] where the evidence tended to show that defendant was driving an automobile at an excessive rate of speed near the center of a populous town on Sunday, at the time people were going to church, and ran on the sidewalk striking plaintiff, our court found these facts sufficient for a jury to find an intent on the defendant's part willfully to injure the plaintiff, justifying civil arrest of defendant. The court adopted as one of the definitions of willfulness and wantonness: "[N]egligence so gross as to manifest a reckless indifference to the rights of another."[10] The court also cited as a correct charge to the jury the following:

> To establish the charge of willfulness . . . an actual intent to do the particular injury alleged need not be shown; but if you find from all the evidence that the misconduct of the defendant's

[5] 29 REF. J. 70 (1955).
[6] 1 COLLIER, BANKRUPTCY 1609 (14th ed. 1940).
[7] 29 REF. J. 70 (1955).
[8] N.C. GEN. STAT. § 1-410 (1953). "The defendant may be arrested . . . in the following cases: 1. In an action . . . not arising out of contract where the action is for wilful, wanton, or malicious injury to person . . . ."
[9] Weathers v. Baldwin, 183 N.C. 276, 111 S.E. 183 (1922); *accord,* Foster v. Hyman, 197 N.C. 189, 148 S.E. 36 (1929), where defendant while drunk drove his automobile on the wrong side of a city street where traffic was heavy. The court held this sufficient to sustain the jury's verdict that the injury was inflicted willfully and wantonly, and thus an order for execution against the person or defendant was proper. In Braxton v. Matthews, 199 N.C. 484, 154 S.E. 735 (1930), it was held that driving recklessly while intoxicated was sufficient to warrant the submission of an issue as to willful, wanton conduct and to sustain an affirmative answer thereto.
[10] Weathers v. Baldwin, 183 N.C. 276, 279, 111 S.E. 183, 185 (1922).

> servants was such as to evince an utter disregard of consequences, so as to inflict the injury complained of, this may of itself tend to establish willfullness.[11]

In general, punitive damages may not be recovered in a case involving ordinary negligence in the absence of any intentional, malicious, or willful act. Wanton conduct, *i.e.,* intentional wrongdoing, is a sufficient basis for an award of punitive damages. North Carolina has held conduct to be wanton when in conscious and intentional disregard of and indifference to the rights and safety of others.[12] That North Carolina shares the modern view and does not require a showing of special malice or intent to injure a particular person[13] is further borne out by the requirements for allegations sufficient for an award of punitive damages which are said to be:

> [T]he complaint must allege facts showing . . . circumstances which would justify the award, for instance, actual malice, or oppression, or gross and wilful wrong, *or wanton and reckless disregard of plaintiff's rights.*[14]

Most courts tend to brand certain specified acts of negligence as sufficient to bring the liability within the scope of the exceptions of section 17 of the Bankruptcy Act. Thus, where it appeared that the bankrupt was driving on the wrong side of the road,[15] deliberately disregarding a traffic signal,[16] and passing another car while it was impossible to see ahead,[17] courts have held the resulting liability to be nondischargeable. However, the acts of speeding,[18] passing a streetcar or school bus,[19] colliding with a parked car,[20] or negligently crossing a railroad track[21] have been held not to entail sufficient disregard for the safety of others to be classified as willful and malicious. The most recent

[11] *Id.* at 279-80, 111 S.E. at 185.

[12] Hinson v. Dawson, 244 N.C. 23, 92 S.E.2d 393 (1956).

[13] In Foster v. Hyman, 197 N.C. 189, 148 S.E. 36 (1929), it was held that willfullness may be constructive, and where the wrongdoer's conduct is so reckless as to amount to a disregard for the safety of others it is equivalent to actual intent.

[14] Lutz Indus., Inc. v. Dixie Home Stores, 242 N.C. 332, 344, 88 S.E.2d 333, 342 (1955). (Emphasis added.)

[15] *In re* Dutkiewicz, 27 F.2d 334 (W.D.N.Y. 1928); Margulies v. Garwood, 36 N.Y.S.2d 946 (Sup. Ct. 1942); Doty v. Rogers, 213 S.C. 361, 49 S.E.2d 594 (1948).

[16] Tharpe v. Breitowich, 323 Ill. App. 261, 55 N.E.2d 392 (1944), *cert. denied,* 323 U.S. 801 (1945). *Contra, In re* Longdo, 45 F.2d 246 (N.D.N.Y. 1930).

[17] Margulies v. Garwood, 36 N.Y.S.2d 946 (Sup. Ct. 1942). *Contra,* Randolph v. Edmonds, 185 Tenn. 37, 202 S.W.2d 664 (1947) (restating the old rule).

[18] Freedman v. Cooper, 126 N.J.L. 177, 17 A.2d 609 (1941); Campbell v. Norgart, 73 N.D. 297, 14 N.W.2d 260 (1944).

[19] *In re* Tillery, 16 F. Supp. 877 (N.D. Ga. 1936); Wyka v. Benedicks, 266 App. Div. 1025, 44 N.Y.S.2d 907 (1943).

[20] Campbell v. Norgart, 73 N.D. 297, 14 N.W.2d 260 (1944); Prater v. King, 73 Ga. App. 393, 37 S.E.2d 155 (1946).

[21] Nunn v. Drieborg, 235 Mich. 383, 209 N.W. 89 (1926).

cases show that the uncertainty still exists as to driving when intoxicated, but the trend, at least in the federal courts, seems to be toward holding this misconduct sufficient for a finding of willful and malicious conduct.[22]

Assuming a close case where the court would be justified either in finding or in not finding willful and malicious conduct, counsel for both sides should decide what effect a bankruptcy by defendant would have on his client and how best to gain or avoid the benefits or handicaps of such bankruptcy. What should the plaintiff allege in his complaint? A judgment which is not based on an allegation or willful and malicious conduct is seldom declared to be based on a wrongdoing of such gravity as to justify denying a discharge.[23] The complaint is of particular importance in a jurisdiction such as North Carolina where specific issues are submitted to the jury and the jury responds to issues and does not find a general verdict.[24] In order for counsel to have the trial judge instruct the jury as to willful and wanton conduct such conduct must be alleged in the complaint.[25] However, allegations in the complaint are not alone sufficient to insure the submission of an issue as to willfulness and malice to the jury. Before an issue can be submitted to the jury, it must be supported by the evidence.[26] Thus it is said that in civil actions the issues are framed on both the pleadings and the evidence.[27] A trial judge in his charge to the jury should present every substantial and essential feature of the case embraced within the issue and arising on the evidence, and this without any special prayer for instructions to that effect.[28]

In a jurisdiction such as North Carolina that uses the issue system the failure of counsel to cause an issue on willful and malicious conduct to be submitted to the jury can be disastrous even though he has correctly pleaded such conduct and has supported his allegations with proof.[29] In a late New York case[30] plaintiff's counsel asked the

[22] Den Haerynck v. Thompson, 228 F.2d 72 (10th Cir. 1955).

[23] 29 REF. J. 70 (1955).

[24] Witsell v. West Asheville & S.S. Ry., 120 N.C. 557, 27 S.E. 125 (1897).

[25] Wilson v. Atlantic Coast Line Ry., 142 N.C. 333, 55 S.E. 257 (1906).

[26] Carland v. Allison, 221 N.C. 120, 19 S.E.2d 245 (1942); Henderson v. Atlantic Coast Line R.R., 171 N.C. 397, 88 S.E. 626 (1916).

[27] Crouse v. Vernon, 232 N.C. 24, 59 S.E.2d 185 (1950).

[28] Smith v. Kappas, 219 N.C. 850, 15 S.E.2d 375 (1941). Griffin v. United Services Life Ins. Co., 225 N.C. 684, 36 S.E.2d 225 (1945), holds that it is the right of counsel to have proper issues submitted. G.S. § 1-200 provides that it is the duty of the attorneys in the case to prepare the issues arising upon the pleadings and present them to the judge, to be by him submitted to the jury if approved. This rule is mandatory, but if for any reason counsel does not so submit the issues it is then the duty of the trial judge to frame the issues.

[29] In Crowder v. Stiers, 215 N.C. 123, 1 S.E.2d 353 (1939), it was held that in order to warrant execution against the person in an action for tort it is necessary that there be an affirmative finding by the jury upon a separate issue of express or actual malice. *Accord,* McKinney v. Patterson, 174 N.C. 483, 93 S.E. 967

trial court to charge the jury respecting wanton negligence, but the court refused to do so on the ground that plaintiff need prove only ordinary negligence in order to recover. The jury rendered its verdict for the plaintiff and the court expressed the opinion that defendant's act came close to wanton negligence. On motion by defendant for an order discharging the judgment against him the judgment was held not to be based on willfull and malicious injury and thus to be dischargeable in bankruptcy. The appellate court held that despite the trial court's opinion, the jury's verdict was conclusive only as to the fact that defendant was negligent and that to be non-dischargeable the judgment roll must show that the judgment was based on a willful and malicious wrong.

The submission of proper issues is also vitally important to the defense counsel. If a verdict is ambiguous in its terms, the ambiguity may sometimes be explained and the verdict interpreted by reference to and in connection with pleadings, evidence, and the charge of the trial court.[31] So if plaintiff's attorney has alleged willful and malicious conduct and has put on evidence to support his allegations it could be unsafe for the defendant to fail to submit the specific issue. New York has held in determining whether a judgment is dischargeable in bankruptcy, resort may be had to the entire record to determine the wrongful character of the act on which the judgment was based, and the form or allegations of the complaint are not conclusive.[32] The Minnesota court has gone so far as to allow a judgment creditor to show by evidence extrinsic to the record the non-dischargeable character of the original obligation, notwithstanding the fact that the judgment roll on its face did not show that it was a debt not dischargeable in bankruptcy.[33]

Thus it appears that if the North Carolina court, since there are no North Carolina decisions in this area, resorts to other jurisdictions in formulating decisions on this facet of the bankruptcy law the only safe course for both plaintiff and defendant is to be sure the issue of willful and malicious conduct is submitted to the jury for determination.[34]

(1917), holding that before execution against a tortfeasor can issue it is necessary that the jury find affirmatively upon an issue as to whether the tortious act was done willfully. The court enunciated the general rule as being that a party cannot object after the time for submitting issues has passed, and certainly not after the verdict, that an issue, for which he made no request, was not submitted by the court. In Turlington v. Aman, 163 N.C. 555, 79 S.E. 1102 (1913), it was held that in order to issue an execution against the person of the defendant in cases where it is permissible, the cause of arrest must be pleaded and proved and judgment rendered.

[30] Thibadeau v. Lonschein, 186 N.Y.S.2d 73 (Sup. Ct. 1959).

[31] Cody v. England, 216 N.C. 604, 5 S.E.2d 833 (1939).

[32] Proctor Sec. Corp. v. Handler, 162 N.Y.S.2d 209 (Sup. Ct. 1959).

[33] Fireman's Fund Indem. Co. v. Caruso, 252 Minn. 435, 90 N.W.2d 302 (1958).

[34] See discussion in note 29 *supra*.

A defendant's counsel, realizing his client is presently insolvent, may feel that the simplest approach is to allow a default to be entered and then have the judgment discharged in bankruptcy. This would not seem to be a wise course in those cases where willful and malicious conduct or facts from which such conduct could be inferred are alleged in the complaint. In a personal injury case the proper result when no pleadings are filed by defendant is default and inquiry since the damages are not liquidated.[35] The effect of a judgment by default and inquiry is threefold: (1) It establishes a right of action of the kind properly pleaded in the complaint. (2) It determines the right of the plaintiff to recover at least nominal damages and costs. (3) It precludes the defendant from offering any evidence in the inquiry to show that the plaintiff has no right to action.[36] Thus if the defendant fails to appear at the inquiry the plaintiff will be free to put on evidence of willful and malicious conduct without fear of rebuttal and be confident of a favorable finding on this issue. If the plaintiff follows this reasoning in the conduct of his case the defendant's subsequent discharge will be of no avail against the judgment. But on the other hand it is equally clear that the plaintiff cannot rely merely on the allegations of his complaint when the defendant fails to appear or plead. To be safe the plaintiff must frame the issue of willful and malicious conduct, put on evidence to support his contention and have the issue submitted for final determination.

In a Colorado case the complaint for damages allegedly suffered in an automobile collision alleged that defendant's negligence consisted of reckless or willful disregard of the rights of others. The trial court heard evidence in support of such allegation and entered default judgment without specifically finding that more than simple negligence was shown. The plaintiffs had execution on the judgment and the defendant interposed his discharge as defense to the execution. The plaintiffs contended that when defendant permitted default to enter against him he admitted the truth of all facts properly alleged in the complaint and that this created a non-dischargeable obligation. The court held the judgment debt discharged and said:

> If plaintiffs desired to protect themselves against the possibility that defendant might seek a discharge in bankruptcy, it was incumbent on them to secure a *specific finding* in the trial court that the negligence of defendant was such that a discharge in bankruptcy would not operate to release the judgment.[37]

[35] N.C. GEN. STAT. § 1-212 (1953).
[36] Howze v. McCall, 249 N.C. 250, 106 S.E.2d 236 (1958).
[37] Valdez v. Sams, 134 Colo. 488, 491, 307 P.2d 189, 190 (1957). (Emphasis added.)

An Ohio court[38] has gone so far as to look beyond the record, which recited that it was the wrongful and intentional acts of defendant that caused the injury, to the evidence offered at the time of judgment to determine whether the action was actually based on wrongful acts or whether it resulted from mere negligence. This court found that the evidence supported mere negligence only and held the bankrupt discharged. This case seems to follow the modern trend of decisions that a court is not concluded by allegations of the complaint and resort may be had to the entire record to determine whether the action was one for willful and malicious injuries to the person or property of another.[39] Though the modern trend is toward this view there is still a definite split of authority.[40] The California court expresses the contrary view as follows:

> By permitting his default to be entered he [the defendant] confessed the truth of all the material allegations in the complaint . . . including the allegations of wantoness, recklessness and gross carelessness . . . . A judgment by default is as conclusive as to the issues tendered by the complaint as if it had been rendered after answer filed and trial had on allegations denied by the answer. . . . Such a judgment is res judicata as to all issues aptly pleaded in the complaint and defendant is estopped from denying in a subsequent action any allegations contained in the former complaint.[41]

In view of the foregoing it submitted that the best course for both plaintiffs' and defendants' attorneys to pursue in their attempt to secure justice for their clients and prevent further litigation is simply to make every effort in cases where willful and malicious injury could be involved to have the issue submitted to the jury. It is believed that if this course is followed there will be no need for a defendant or a plaintiff to try the issue of whether a particular judgment is or is not discharged in bankruptcy when the judgment is sued on. The verdict and judgment on this issue by the court trying the personal injury action will put an end to litigation of dischargeability.

W. TRAVIS PORTER

[38] Carroll v. Jones, 3 Ohio Op. 2d 221, 141 N.E.2d 239 (1956).
[39] Annot., 145 A.L.R. 1238 (1943).
[40] Tharpe v. Breitowich, 323 Ill. App. 261, 55 N.E.2d 392 (1944); Reell *ex rel.* Haskin v. Central Illinois Elec. & Gas Co., 317 Ill. App. 106, 45 N.E.2d 500 (1942).
[41] Fitzgerald v. Herzer, 78 Cal. App. 2d 127, 177 P.2d 364, 366 (1947).

Corporations—Settlement of Stockholders' Derivative Actions—Res Judicata

A stockholders' derivative suit was brought in the Federal District Court for the District of Columbia subsequent to the commencement of a similar action on the same issues by other stockholders in a New York state court. The plaintiffs in both actions were minority shareholders who were bringing suit on behalf of the corporation against the majority shareholders. In both actions it was alleged that the majority shareholders had dominated the corporation causing it to purchase assets of two other corporations at excessive prices. The federal court in *Reiter v. Universal Marion Corp.*[1] granted the defendants' motion for a stay of proceedings pending the outcome of the state action wherein a proposed settlement was before the New York court for approval.[2] The plaintiffs were given leave to move to vacate the stay if the proceedings in the New York court were not prosecuted with due diligence.

The power to stay proceedings is incidental to the power in every court to control the disposition of cases on its docket to economize time and effort for itself, for counsel, and for litigants.[3] It is a well established rule, however, that the mere pendency of a state action involving the same parties and the same subject matter does not as a matter of right entitle the defendant to a stay of similar proceedings subsequently brought in a federal court.[4] The determination of whether or not such a stay should be granted is within the sound discretion of the trial court judge.[5] Exactly when the exercise of discretion in favor of granting a stay is called for is not susceptible to any clear-cut lines of demarcation as a matter of law. In certain situations involving stockholders' derivative actions, both state[6] and federal[7] courts have granted stays which

[1] 173 F. Supp. 13 (D.D.C. 1959).

[2] In an earlier case motion by defendants for a stay of proceeding in the federal court pending the outcome of the New York action had been denied by the federal district court, but the court here thought that there had been substantial change in circumstances since that decision. The change in circumstances referred to included the facts that a hearing on the fairness of the compromise had been held before a New York referee subsquent to the previous motion in the federal hearing, and that an order from the Court of Appeals for the District of Columbia denying the prior motion had disavowed any implication in its ruling that the New York stipulation of settlement did not cover the entire controversy.

[3] Landis v. North American Co., 299 U.S. 248 (1936).

[4] Arny v. Philadelphia Transp. Co., 163 F. Supp. 953 (E.D. Pa. 1958), *appeal dismissed*, 266 F.2d 869 (1959).

[5] Levy v. Alexander, 170 F. Supp. 439 (E.D.N.Y. 1959); Kamen Soap Prods. Co. v. Struthers Wells Corp., 159 F. Supp. 706 (S.D.N.Y. 1958); Brendle v. Smith, 46 F. Supp. 522 (S.D.N.Y. 1942).

[6] Farmland Irrigation Co. v. Dopplmaier, 308 P.2d 732 (Cal. 1957); Shanik v. Aller, 52 N.Y.S.2d 87 (Sup. Ct. 1944); Milvy v. Sperry Corp., 36 N.Y.S.2d 881 (Sup. Ct. 1939).

[7] Mottolese v. Kaufman, 176 F.2d 301 (2d Cir. 1949); Schreiber v. Jacobs, 121 F. Supp. 610 (E.D. Mich. 1953); Dederick v. North American Co., 48 F. Supp. 410 (S.D.N.Y. 1943); Brendle v. Smith, 46 F. Supp. 522 (S.D.N.Y. 1942); Ratner

were dependent upon the disposition of another suit in a state or federal court. In such a case the party applying for the stay must always make out a clear case of hardship or inequity in being required to go forward with the action.[8] Generally, the objection to multiple actions has been that they are very expensive and harassing for the defendant who must fight his battle on several fronts. In cases where the stay has been granted the following conditions were present: (1) the defendants in both actions were substantially identical, (2) the subject matter of the suits was the same, and (3) the disposition of one suit would finally determine all of the questions in the other action.

It becomes important, therefore, to examine the conditions in the principal case which motivated the court to exercise its discretion in favor of the proposed stay. In addition to the fact that the two actions sought substantially the same relief on the same issues for the same corporation, these conditions were: (1) all individual defendants against whom a money judgment was sought were before the New York court, but the federal court had not secured jurisdiction over the principal defendants, (2) the New York action was brought first, hearing on the merits had already been held, and the referee was about to render a report to the court on the fairness of the proposed settlement, (3) settlement of the stockholders' derivative suit in New York would not be accomplished without first being approved by the New York Court. These factors weighed heavily in favor of allowing the stay, especially since there was a probability of a speedy determination of the New York action. Also the plaintiffs appear to have advanced no valid argument that they would be prejudiced or irreparably harmed if the stay were granted. The principal case appears to have reached a desirable result in that it saves expense to the litigants and avoids unnecessary consumption of time in court without depriving shareholders of any substantial rights.

The language of the principal case intimated that if the proposed settlement had not been subject to approval in the state court, then the stay would not have been granted.[9] The court stated, however, that an approved settlement of the state action would be res judicata to all other actions involving the same issues. Thus, the court indicates that it would give the same effect to a court-approved settlement as it would to a final judgment on the merits of the cause. In the absence of fraud or collusion of the parties, a judgment on the merits rendered by a court in a stockholders' derivative action is res judicata against both the corpora-

v. Paramount Pictures, Inc., 46 F. Supp. 339 (S.D.N.Y. 1942); Schwartz v. Kaufman, 46 F. Supp. 318 (E.D.N.Y. 1940).

[8] Brendle v. Smith, 46 F. Supp. 522, 524 (S.D.N.Y. 1942) (dictum).

[9] 173 F. Supp. at 15.

tion and other stockholders in any subsequent suit on the same corporate cause of action.[10]

The Second Circuit Court of Appeals[11] and a New York Supreme Court[12] have held court-approved settlements in form of judgments to be res judicata. *Stella v. Kaiser*[13] involved the effect on a subsequent case of a settlement decree in a stockholders' derivative suit entered by a federal court. The Court of Appeals stated that a member of the class of stockholders in a derivative suit is bound by and must accept a judicially approved compromise in his behalf.[14] In a leading New York case, *Gerith Realty Corp. v. Normandie Nat'l Sec. Corp.*,[15] a stockholders' derivative action was brought on the same issues which had been compromised in open court before judgment in an earlier suit. The settlement was held to be binding on the corporation and on all persons having the capacity to sue in the corporation's behalf whether or not they had received notice of the settlement proposal.[16]

Under the New York rules of practice the court, as a matter of discretion, may require its approval of any settlement in a derivative action which terminates the corporate right of action.[17] The court also may appoint a referee to inquire into the fairness of the compromise[18] or seek the vote of the other stockholders.[19] Under Rule 23(c) of the Federal Rules of Civil Procedure, it is mandatory that the settlement be submitted for court approval.[20]

Approval of the settlement is always discretionary, but the court must consider all available facts and any objections of other stockholders.[21] Notice of the impending settlement[22] should be given to the

[10] Dana v. Morgan, 232 Fed. 85 (2d Cir. 1916); Liken v. Shaffer, 64 F. Supp. 42 (N.D. Iowa 1946); Willoughby v. Chicago Junction Rys. & Union Stockyards Co., 50 N.J. Eq. 656, 25 Atl. 281 (1892); 13 FLETCHER, CYC. CORPS. § 6043 (perm. ed. 1943); STEVENS, PRIVATE CORPORATIONS § 173 (1949).

[11] Stella v. Kaiser, 218 F.2d 64 (2d Cir. 1954).

[12] Gerith Realty Corp. v. Normandie Nat'l Sec. Corp., 276 N.Y. Supp. 655 (Sup. Ct. 1933).

[13] 218 F.2d 64 (2d Cir. 1954).

[14] Stella v. Kaiser, 218 F.2d 64 (2d Cir. 1954). However, in this case, the plaintiff had been a participant in the first action. In a strong dictum the court stated that even without plaintiff's participation in the prior action, he would be bound by the previous action because it was a conclusive adjudication of a true class action.

[15] 276 N.Y. Supp. 655 (Sup. Ct. 1933), *aff'd*, 241 App. Div. 717, 269 N.Y. Supp. 1007 (1934), *aff'd*, 266 N.Y. 525, 195 N.E. 183 (1935).

[16] *Ibid.*

[17] N.Y.R. CIV. PRAC. 8; Gerith Realty Corp. v. Normandie Nat'l Sec. Corp., 215 N.Y. Supp. 655 (Sup. Ct. 1933).

[18] Breswick v. Briggs, 135 F. Supp. 397 (S.D.N.Y. 1955).

[19] Gerith Realty Corp. v. Normandie Nat'l Sec. Corp., 276 N.Y. Supp. 655 (Sup. Ct. 1933); BALLENTINE, CORPORATIONS § 155 (1946).

[20] Robbins v. Sperry Corp., 1 F.R.D. 220 (S.D.N.Y. 1940). The court so ruled even as to a dismissal of some of the defendants, with the action still pending as to others.

[21] MOORE, FEDERAL PRACTICE ¶ 23.24 (1948).

[22] Hornstein, *New Aspects of Stockholder's Derivative Suits*, 47 COLUM. L.

shareholders in every case because the right or duty involved belongs to them,[23] and under the Federal Rules of Civil Procedure notice must be given in compromise settlements of all true class actions.[24] In New York the court apparently has the discretion as to whether or not notice is to be given to other stockholders before the settlement is approved.[25]

Under both New York and federal decisions the proceeds of a derivative action belong to the corporation;[26] certainly such proceeds should not be retained to the plaintiff's individual use, as opposed to the corporation's use, whether realized by judgment, court-approved settlement, or private settlement.

In New York the courts have recognized the power in the plaintiff to discontinue or privately settle his suit at any time before judgment or before intervention by another stockholder.[27] Other shareholders, however, may intervene at will and divest the original plaintiff of his dominion over the suit.[28] Under Rule 23 of the Federal Rules of Civil Procedure private settlements of stockholders' derivative suits are not allowed in federal controversies. Eleven states have adopted rules similar to Rule 23;[29] however, North Carolina has not done so.

REV. 1, 21 (1947). "The notice . . . usually advises the stockholder: that one or more derivative suits are pending on behalf of his corporation; that a settlement has been proposed and that a copy of the settlement offer is annexed; that the court has set a date for a hearing to determine whether the offer should be accepted; that the court has directed that all stockholders of record be given notice by mail and ordered to show cause at such hearing why the settlement should not be accepted and approved by the court as fair and reasonable; that the pleadings, examinations before trial, minutes of the trial to date, and all papers in the litigation may be examined at the office of the county clerk or at the offices of the general counsel for the plaintiffs.

Annexed to the notice is usually a complete copy of the offer addressed to the corporation and plaintiff's counsel. The offer states what the defendants are willing to pay or do in exchange for a termination of the suit and for releases to them . . . ."

[23] See note 22 *supra*.

[24] FED. R. CIV. P. 73. "Rule 23(a)(1) of the Federal Rules of Civil Procedure classifies the shareholders' derivative suit as a species of 'true' class suit which is defined to be an action where the interest of the members of a class is joint, common, or secondary (derivative) and where the members are so numerous that it would be impracticable to bring them all before the court . . . ." LATTIN & JENNINGS, CASES & MATERIALS ON CORPORATIONS 738 (1959).

[25] N.Y.R. CIV. PRAC. 8.

[26] Klein v. Klein's Outlet, Inc., 160 F.2d 412 (2d Cir. 1947); Clark v. Greenberg, 296 N.Y. 146, 71 N.E.2d 443 (1947).

[27] Manufacturer's Mut. Fire Ins. Co. v. Hopson, 25 N.Y.S.2d 502 (Sup. Ct. 1940); Dresdner v. Goldman Sachs Trading Corp., 240 App. Div. 242, 269 N.Y. Supp. 360 (1934); Brinkerhoff v. Bostwick, 99 N.Y. 185, 1 N.E. 663 (1885).

[28] Manufacturer's Mut. Fire Ins. Co. v. Hopson, *supra* note 27 (dictum); 13 FLETCHER, CYC. CORPS. § 6001 (perm. ed. 1943).

[29] ARIZ. REV. STAT. ANN., R. CIV. PROC., Rule 23(c) (1956); DEL. CODE ANN., RULES OF COURT OF CHANCERY, Rule 23(c) (1953); ILL. ANN. STAT. ch. 110, § 52.1 (Smith-Hurd 1956); IOWA CODE ANN., R. CIV. PROC., Rule 45 (1951); KY. REV. STAT., R. CIV. PROC., Rule 23.02 (1959); NEV. REV. STAT., R. CIV. PROC., Rule 23(c) (1959); N.M. STAT. § 21-1-1, Rule 23(c) (1953); PA. STAT. ANN. tit. 12, R. CIV. PROC. 2230(b) (1951); TEX. R. CIV. PROC., Rule 42(b) (1954); UTAH

In jurisdictions that allow private settlements, whereby individual plaintiffs settle out of court, such settlements are not res judicata as to other stockholders. A voluntary discontinuance of a derivative action in this manner would not bar a subsequent suit by other stockholders; however, once a derivative suit is voluntarily discontinued, the same suit may not be revived by a motion in the cause.[30] This rule against revival was applied in *Manufacturer's Mut. Fire Ins. Co. v. Hopson*,[31] where the New York court refused to reopen a stockholders' suit which had been privately settled by purchase of the complainant's stock at seven times the market value with funds of the corporation on whose behalf the suit had been brought. Although the court stated that the termination under these circumstances would not bar a new suit by the corporation, in such a case it may be that the statute of limitations has run.[32]

Settlements, as a compromise to litigation, are generally encouraged in order to reduce the administrative burdens and expense to the courts and litigants. The requirement of court approval brings a proposed settlement out in the open where its fairness may be compared with the results that might be secured should the case proceed to trial. Generally court approval of these settlements is given by way of a final decree or judgment;[33] however, the effect of an approved settlement when not rendered in this official form, *e.g.*, the mere notation of the court's approval upon the record, is uncertain. A recommended method of clearly resolving questions of law in this area is the enactment of legislation similar to federal rule 23 but broader in scope. Such legislation should prohibit discontinuance, settlement, or compromise without court approval, and provide for the finality of court approved settlements, as well as specify the form in which such approval is to be rendered.

ROBERT N. RANDALL

Covenants Not To Compete

Covenants not to compete are most commonly found in contracts for the sale of a business or in contracts of employment and have as their

CODE ANN., R. CIV. PROC., Rule 23(c) (1953); WYO. STAT., R. CIV. PROC., Rule 23(c) (1959).

[30] See generally STEVENS, PRIVATE CORPORATIONS § 173 (1949).

[31] 25 N.Y.S.2d 502 (Sup. Ct. 1940), *aff'd*, 262 App. Div. 731, 29 N.Y.S.2d 139 (1941), *aff'd*, 288 N.Y. 688, 43 N.E.2d 71 (1942).

[32] *Ibid.*; Hornstein, *Problems of Procedure in Stockholder's Derivative Suits*, 42 COLUM. L. REV. 574, 583 (1942).

[33] Stella v. Kaiser, 218 F.2d 64 (2d Cir. 1954); Gerith Realty Corp. v. Normandie Nat'l Sec. Corp., 215 N.Y. Supp. 655 (Sup. Ct. 1933); Reiter v. Universal Marion Corp., 173 F. Supp. 13, 15 (1959) (dictum).

object protection of the convenantee.[1] It is the purpose of this Note to examine the limitations on the validity of such covenants and to consider what constitutes a breach or interference with rights thereunder.

In addition to the requirements that such covenants be supported by consideration[2] and be in writing,[3] our court seems to look only at the reasonableness[4] of the provisions in determining their validity. The court in almost every instance when it sets forth the factors it will consider in determining the reasonableness of a covenant includes the time period as a vital factor. Yet the fact is that in no decision has a covenant been found to be unreasonable because of too extensive a duration. Of the eight cases found where the covenant was not upheld, always for other reasons, the limitation on the duration of the covenants was a certain number of months,[5] two years,[6] three years,[7] five years,[8] or ten years,[9] and in three cases no time period was specified.[10] A similar range in the length of time the covenants were to last may be found in those cases where the covenants have been upheld.[11] In cases where the restriction was either "as long as the covenantee lives" or "as long as the covenantee continues in business" the court indicated it would interpret the length of time of the covenant to be co-extensive with the cov-

[1] "There are several reasons for the growing popularity of such covenants: 1. The raiding of employee talent by some employers. 2. The increasing business need to develop technical innovations and keep them secret. 3. Increased spending for research and development." Nation's Business, Oct. 1959, p. 14.

[2] Kadis v. Britt, 224 N.C. 154, 29 S.E.2d 543 (1944); Teague v. Schaub, 133 N.C. 467, 45 S.E. 765 (1903); see generally 17 C.J.S. *Contracts* § 260 (1939); 5 WILLISTON, CONTRACTS § 1636 (1937).

[3] N.C. GEN. STAT. § 75-4 (1950); Radio Electronics Co. v. Radio Corp. of America, 244 N.C. 114, 92 S.E.2d 664 (1956); Maola Ice Cream Co. v. Maola Milk & Ice Cream Co., 238 N.C. 317, 77 S.E.2d 910 (1935)

[4] Beam v. Rutledge, 217 N.C. 670, 9 S.E.2d 473 (1939); Cowan v. Fairbrother, 118 N.C. 406, 24 S.E. 813 (1896); 17 C.J.S. *Contracts* § 240 (1939); 5 WILLISTON, CONTRACTS § 1636 (1937).

[5] Culp v. Love, 127 N.C. 457, 37 S.E. 476 (1900).

[6] Kadis v. Britt, 224 N.C. 154, 29 S.E.2d 543 (1944).

[7] Comfort Springs v. Burroughs, 217 N.C. 658, 9 S.E.2d 473 (1939).

[8] Noe v. McDevitt, 228 N.C. 242, 45 S.E.2d 121 (1947).

[9] Shute v. Shute, 176 N.C. 462, 97 S.E. 392 (1918).

[10] Maola Ice Cream Co. v. Maola Milk & Ice Cream Co., 238 N.C. 317, 77 S.E.2d 910 (1953); Teague v. Schaub, 133 N.C. 468, 45 S.E. 762 (1903); Shute v. Heath, 131 N.C. 281, 42 S.E 704 (1902).

[11]

Covenant Upheld (cases)	*Time Period (years)*
6	No time period.
2	Lives of the parties.
2	1
4	2
4	3
2	5
2	10
1	15
1	20

enantor's life span.[12] In *Shute v. Heath*[13] no time limitation was set out in the contract and the court said, "An indefinite restriction as to duration will not make such contracts void."[14]

As to a second area of reasonableness, the territorial extent of the restriction, there is a precedent question. Our court has said, "[T]here must be a definite limitation as to space; and the reasonableness of such limitation will depend upon the nature of the business and goodwill sold."[15] This raises the questions what standard will be applied to determine if the limitation is definite enough and, if sufficiently definite, when is the criterion of reasonableness met.

In *Shute v. Heath* there was a contract for the sale of a manufacturing business which included a restrictive covenant containing a limitation as to "any territory now occupied by them [covenantees] or from which they [covenantees] secure their patronage." The court held that this was not a sufficient limitation on the area. The court reasoned that where the covenantor could not secure patronage in the future is not something that could be determined at the time the contract was entered into. It should be noted that the decision rested not on the unreasonableness of the limitation, but on its indefiniteness.

The standard of measurement that has been applied by the court to determine if the territorial limitation is sufficiently definite is whether the rules that apply to the description of real estate in deeds have been satisfied.[16] However, the court seems to use two means other than the actual words of the contract to decide what actually is the extent of the limitation—namely, implied restrictions and restrictions established by parol testimony. In *Hauser v. Harding*[17] the restricting words in the contract were "the territory surrounding Yadkinville." Though the territory outside the town could not be identified, the town limits could be and the court held the contract was not uncertain to this extent and should be interpreted by implication to mean "within the town limits of Yadkinville."[18] In *Teague v. Schaub*[19] the limitation, "If the field [of

[12] This raises a problem as to what the court would decide if the covenantee either died before the covenantor or went out of business. It seems unlikely that the covenantor would be bound for life in either situation. It is submitted that the court would probably find that the covenantor would be bound for life, if either of these two events did not transpire during the covenantor's life span.

[13] 131 N.C. 281, 42 S.E. 704 (1902).

[14] *Id.* at 282, 42 S.E. at 704.

[15] *Id.* at 282, 42 S.E. at 704.

[16] Shute v. Heath, 131 N.C. 281, 42 S.E. 704 (1902); Hauser v. Harding, 126 N.C. 295, 35 S.E. 586 (1900). *But see* 17 C.J.S. *Contracts* § 256 (1939), stating that by the majority view the criterion is that the contract must be sufficiently specific to allow a determination of its reasonableness.

[17] *Supra* note 16.

[18] See also Wooten v. Harris, 153 N.C. 43, 68 S.E. 898 (1910), where the court, expressly following *Hauser,* said that the territorial limitation "in the town of Falkland or near enough thereto to interfere with the plaintiff's business," though

a medical practice] is not larger then than now," was too indefinite and the court refused to imply a restriction. The court reasoned that this limitation could relate to receipts from the practice, the number of patients, or the extent of the territory.[20]

The court in a recent case[21] allowed parol testimony to determine the territorial limits of the restriction "in Lenoir or the territory now covered by him [covenantor]," finding it to cover ten counties. The court looked to what territory came within the confines of the restrictive covenant at the time the covenant was made, not at the time of the litigation. The covenant specified the territory "now covered" by the vendor's business and the court found this was not void for indefiniteness of description because the territory could be specifically located by parol evidence.

Once the territory is found definite enough, the proper conclusion would seem to be that the primary consideration of the court in determining whether there is a reasonable restraint on territory is whether the territory is greater than that required to protect the covenantee's business.[22] In *Noe v. McDevitt*[23] the covenant included North and South Carolina, but the covenantee's business only covered eastern North Carolina. The court held that the covenant covered too extensive a territory to be a reasonable protection of the covenantee's business and was thus void as against public policy. It has been suggested that a more appropriate remedy could have been reached in the *Noe* case if the court had enforced the contract only as far as the actual needs of the covenantee's business extended in eastern North Carolina instead of declaring the whole contract of no effect.[24]

The third area in which the test of reasonableness must be met concerns the hardship that may be imposed on the covenantor. Although the court does not seem to pay particular attention to this factor in contracts other than contracts of employment, it appears that employment contracts will be carefully scrutinized to ascertain whether there is any undue oppression resulting to the covenantor-employee.[25] It should be

indefinite as to any place outside the city, was definite enough if limited to the city limits.

[20] 133 N.C. 458, 45 S.E. 762 (1903).

[20] The dissent reasoned that "field" should mean "Roxboro and the adjacent area" and that the *Hauser* case should control, so that this should be interpreted to mean the city limits of Roxboro. The dissent also favored the admission of parol testimony to determine the extent of the restraint.

[21] Thompson v. Turner, 245 N.C. 478, 96 S.E.2d 263 (1957).

[22] See Thompson v. Turner, *supra* note 21.

[23] 228 N.C. 242, 45 S.E.2d 121 (1947).

[24] See Note, 26 N.C.L. REV. 402 (1948).

[25] "[T]he English and American courts make a substantial distinction between the two in administrative practice. . . . The distinction rests on a substantial basis, since, in the former class of contracts we deal with the sale of commodities, and in

noted that when this issue is to be determined the burden of proof is on the covenantee-employer to establish its reasonableness.[26]

There is a difference between the standard of reasonableness applied to a restrictive covenant in the case of a person in a professional or executive type job and that applied in the case of an employee.[27] The reason for the difference is that an employee only has his labor to sell. If in urgent need of selling he will more probably accede to an unreasonable restriction at the time of his employment without proper thought for the future than will a person in a professional or executive type job who is in a better position to guard his own interests and is more capable of comprehending the after-effects. Consequently, the court seems to scrutinize less carefully the professional or executive contracts than common employment contracts in determining whether any undue hardship is placed on the covenantor.

The final factor in determining the reasonableness of a restrictive covenant is whether the dominant intent of the parties was, in effect, to oppress the public. In *Shute v. Shute*[28] the court held the covenant invalid because there was no intent to protect good will, but only an attempt to divide the territory in order to keep out all competitors, an object which was said to be against the interests of the public.[29] It should be noted that as the court seems to have decided that the attempt to divide the area was present on the face of the contract, it speaks in terms of the intent present at the time the contract was made as opposed

---

the latter class with the performance of personal service—altogether different in substance; and the social and economic imlications are vastly different. . . . Contracts restraining employment are looked upon with disfavor in modern law. . . . And they have been held to be *prima facie* void. . . . [T]he argument against restraint of employment was—and still is—more powerful than those based on the evils of monopoly incident to restriction in sales contracts." Kadis v. Britt, 224 N.C. 154, 160, 29 S.E.2d 543, 546 (1944). See generally 5 WILLISTON, CONTRACTS § 1643 (1937); RESTATEMENT, CONTRACTS § 515, comment *b* (1932); 43 A.L.R.2d 111 (1935).

[26] Kadis v. Britt, *supra* note 25.

[27] Sonotone Co. v. Baldwin, 227 N.C. 387, 42 S.E.2d 352 (1947) (contract between a district manager and a corporation); Beam v. Rutledge, 217 N.C. 670, 9 S.E.2d 473 (1939) (contract between two physicians).

[28] 176 N.C. 462, 97 S.E. 392 (1918). *But see* Culp v. Love, 127 N.C. 457, 462, 37 S.E. 476, 478 (1900), where the court said: "The intention of the parties [to the contract] is immaterial." This statement on its face is in conflict with the statement made by the court in *Shute v. Shute*. The intention referred to in the *Culp* case was a subjective belief of the parties as to the legal effect of the contract. This belief is not controlling. The intention referred to in *Shute v. Shute* was the dominant purpose of the contract. This purpose or object is controlling. Both cases held that if the object of a contract is found primarily to shut off all competition, not incidentally to do so, then the contract is against public policy and of no effect.

[29] The court has said it will allow a contract to remain valid, though in part designed to stifle competition. The covenant must not be solely for that purpose. Faust v. Rohr, 166 N.C. 187, 81 S.E. 1096 (1914). See generally RESTATEMENT, CONTRACTS § 518 (1932); 5 WILLISTON, CONTRACTS § 1648 (1937).

to that at the time of litigation. The court has indicated that it is not necessary that the *effect* be a division of land which causes all competitors to keep out as long as this is the present *intent.*

In looking to the intent of a restritive covenant, the court has two basic considerations, the needs of the public and the nature of the business. In *Shute v. Shute* the court found the object of the contract was to divide the territory between the covenantor and the covenantee in putting up ginning plants. The court said there should be a multiplication of plants according to the needs of the public, and that the public would be burdened if a competing ginning mill was too distant to make patronizing it economically feasible; consequently, the number of gins to be erected should not be restricted by an agreement between the parties in that line of business.[30] In *Morehead Sea Food Co. v. Way & Co.*,[31] where the covenantor sold his business to a corporation composed of all the major buyers of fish in a particular area, the court said there was nothing on the face of the contract showing an intent to prevent others from engaging in the same business. The court noted the fact that there were more competitors at the time of the suit than at the time the contract was made and that the public was getting the benefit from the ensuing competition.[32] In *Cowan v. Fairbrother*[33] the court upheld an agreement not to publish a competing newspaper in North Carolina. This seems to have been justified on the ground that "in its very nature this [agreement] could not seriously affect the public, because there is free opportunity to establish newspapers, which are largely the product of the individual ability of the editors."[34]

In addition to the discussion of the primary question of what factors are considered by the court in determining the reasonableness of a restrictive covenant, it is appropriate to consider how or when the question arises. The question usually arises when the covenantee finds the covenantor, either alone or in association with a third party, competing with him in spite of the covenant.

[30] See generally Breckenridge, *Restraint of Trade in North Carolina*, 7 N.C.L. REV. 249 (1929).

[31] 169 N.C. 679, 86 S.E. 603 (1915).

[32] The dissent reasoned the contract on its face was designed to monopolize the entire market. The basic question for the dissent was whether it is possible to injure the public, not whether the public is actually being injured. See also Wooten v. Harris, 153 N.C. 43, 68 S.E. 898 (1910), where the court said an agreement might be invalid "if it were shown that this was one of many similar contracts tending to engross or monopolize any given business, or the sale of any article, within the territory named." *Id.* at 46, 68 S.E. at 899.

[33] 118 N.C. 406, 24 S.E. 813 (1896).

[34] Morehead Sea Food Co. v. Way & Co., 169 N.C. 679, 688, 86 S.E. 603, 607 (1915).

In *Reeves v. Sprague*,[35] where the action was against a third party and the covenantor, the third party had bought the inventory of the covenantor, giving a purchase money mortgage to secure the payment of the purchase price. The court held it "would not restrain the covenantor from selling of leasing his premises to others to engage in the business which he has agreed to abstain from carrying on or from selling to them machinery or supplies needed in embarking in it."[36] The holding of a mortgage by the covenantor was not deemed a sufficient interest to violate the covenant. The court seemed to look at whether the covenantor had divested himself of all interest in the subject matter of the covenant, and, if not, to how to direct his interest and control were in the competing activities of the third party. The court seemed to look at the third party to see whether his activities evidenced an alliance with the covenantor to avoid the effect of the covenant or whether the third party had intentionally induced the covenantor to breach the covenant.

In *Kramer v. Old*,[37] where the action was against the covenantor, the court held "[A] different rule [from that in the *Reeves* case] must prevail when it appears that the prohibited party attempts, not to sell outright to others, but to furnish the machinery or capital, or a portion of either . . . in a corporation organized with a view to competition with the person protected by his contract against such injury."[38] In *Finch v. Michael*[39] the covenantor loaned money to the third party who competed directly with the covenantee, but the court held the covenantor did not have sufficient interest in the third party's business to violate his contract with the covenantee. The holding in the *Finch* case as to the furnishing of capital seems to disregard the language of the court in the *Kramer* case forbidding it. However, in *Finch* the court seems to be looking at the actual effect of the furnishing of capital to the third party and not at the motive of the covenantor. The court in *Finch* seemed to admit there was a breach of the covenant, but it did not feel there was a substantial breach present. The court admitted that the covenantor "might not be acting with due propriety nor with good faith" but it could not see how he had committed any legal wrong.[40]

[35] 114 N.C. 647, 19 S.E. 707 (1894).
[36] Finch v. Michael, 167 N.C. 322, 324, 83 S.E. 459, 460 (1914).
[37] 119 N.C. 1, 25 S.E. 813 (1896).
[38] *Id.* at 12, 25 S.E. at 815; *cf.* King v. Fountain, 126 N.C. 196, 35 S.E. 428 (1900), where the covenanator got his wife to set up a business in competition with the covenantee and the court said: "[I]t requires but little scrutiny to look through these facts and discover who controls the business and enjoys the profits."
[39] 167 N.C. 322, 83 S.E. 458 (1914).
[40] *Id.* at 325, 83 S.E. at 460. *But see* Baker v. Cordon, 86 N.C. 119 (1882), where the court said the covenantor had to maintain his "personal separation" from the business the covenantee was engaged in and could not be "instrumental in inducing others to embark in it." See also Kramer v. Old, 119 N.C. 1, 25 S.E. 813 (1913).

In *Sineath v. Katzis*[41] the vendor corporation sold all its assets to the covenantee. The covenantor was president of the vendor corporation and owned ninety-eight percent of its stock. The court said that the covenantor did not need to have a direct interest in the business sold to be subject to a validly binding restrictive covenant; he needs only to be prominent in the business sold.[42] The court seemed to feel that this would satisfy the requirement that the covenant be incidental to or in support of another lawful contract, a requirement necessary because the covenantor must receive a valuable consideration in return for his agreeing to the restraint. The court uses language to the effect that if the parties intended that the covenant should be incidental to the main transaction,[43] though there was no express agreement present, this would be satisfactory.

As stated in *Sineath,* the general rule is that a third party cannot be enjoined from engaging in the business covered by the covenant or be otherwise held liable except when he, knowing of the covenant, aids the covenantor in violating his covenant or receives some benefit from the violation. In *Sineath,* after the vendor corporation had sold to the vendees all its real and personal property, the third party organized a corporation which competed with the covenantees. The covenantor participated indirectly in its management and in the profits the new corporation made. As a consequence, the court found that the third party as well as the covenantor had participated in a breach of the contract.

In *Sineath* the court seems to take the position that the corporation is not to be enjoined from competing with the covenantee, though the corporation was organized and supported by the covenantor, unless the corporation is found to be the alter ego[44] of the covenantor. The court mentioned the fact that the covenantees failed to show who the stockholders were or what interest any particular party had in the new corpo-

[41] 218 N.C. 740, 12 S.E.2d 611 (1940).

[42] In order to hold an outsider liable for compensatory damages for causing a breach of contract, the following elements are required: (1) that there existed a valid contract between the third party and the plaintiff; (2) that the outsider had knowledge of the existence of such a contract; (3) that the outsider intentionally induced the third party not to perform his contract; (4) that the outsider acted without justification; and (5) that the outsider's action caused the plaintiff actual damage. The outsider has knowledge of the contract if he knows the facts which give rise to the plaintiff's contractual right against the third party. He is subject to liability even though mistaken as to the legal sufficiency of the contract and the significance thereof and believes there is no contract or that the contract means something other than what it is judicially held to mean. If the outsider acts without a sufficient lawful reason then he has acted without justification. Childress v. Abeles, 240 N.C. 667, 84 S.E.2d 176 (1954).

[43] Sineath v. Katzis, 218 N.C. 755, 12 S.E.2d 611 (1940). See also 17 C.J.S. *Contracts* § 246 (1939).

[44] See generally LATTY, SUBSIDIARIES AND AFFILIATED CORPORATIONS 64-65 (1936).

ration. For this reason the court seemed to feel that the new corporation had not been brought within the exception to the general rule.

In summary, the court thus far in its decisions does not seem to give any substantial weight to the duration of the covenant. However, the covenantee would seem well advised to avoid a covenant that lasts forever, and to limit the covenant to the lives of the parties involved, since the court has used language in its decisions which would give it an adequate peg on which to hang any future finding of unreasonable duration.

In respect to the extent of the territory the covenant is to include, any restriction on the covenantor which is all-encompassing should be avoided. The covenantee, of course, will want to draw up a contract that will include the territory presently covered by the covenantee's business and, at the same time, will include the territory the covenantee will reasonably need protected in the future. Perhaps one means to accomplish this is to separate the territory into various segments so that the court, if it feels the outer limits are unreasonable, can easily enforce the covenant as to a portion without destroying the entire contract.

The covenantee will have no guide as to whether the contract will be in violaton of public policy. To say the court looks to the nature of the business and the needs of the public is nebulous and of little help outside fact situations like those ruled on in prior cases. Thus, the matter is largely one of prediction. As a further difficulty, the court does not always make clear in its decisions whether it looks at the reasonableness of the covenant at the time the contract was made or at the time the contract is being litigated. Finally, it should be noted that the court does not seem to consider any one factor of reasonableness alone in arriving at its decisions.

W. THOMAS RAY

Landlord and Tenant—Liability of Landlord for Personal Injuries Caused by His Failure To Repair

In a recent case from the Third Circuit,[1] plaintiff, a social guest in the home of a tenant, was injured as she left the premises. She sued the landlord, alleging that, in performing his covenant to make repairs, he negligently installed a light fixture and that as a consequence of this improper installation she was injured. The district court gave summary judgment for the defendant. The circuit court reversed, saying that under New Jersey law, when the landlord undertakes to make repairs, he is bound to perform the work in a reasonably careful manner, and for failure to do so he will be liable in tort to one injured because of his negligence.

[1] Krieger v. Ownership Corp., 270 F.2d 265 (3d Cir. 1959).

The question of liability of the landlord for personal injuries resulting from the disrepair of the demised premises may arise in any of three situations: (1) where, in the absence of a covenant to repair, he does not repair and one is injured; (2) where he fails to perform a covenant to repair and one is injured; (3) where, with or without a covenant to repair, he undertakes to make repairs but does the work negligently and one is injured. Further, in each of these situations, a question arises as to the landlord's liability to different classes of people—for example, tenants, guests of tenants, business visitors and strangers.[2]

Where There Is No Covenant To Repair

American courts with few exceptions continue to adhere to the common law rule that where there is no covenant to repair the landlord is under no duty to do so; therefore, they conclude that he is not liable for personal injuries sustained by the tenant or his guests because of the disrepair of the premises.[3] The majority reasons that the duty to repair is an incident of control; and since the tenant has control of the premises—including the right to admit or exclude visitors—he has the duty to repair.[4] Since the rights of the tenant's guests are ordinarily the same as those of the tenant, those jurisdictions following the majority view deny the guest recovery.[5] North Carolina appears to be firmly in accord with the majority.[6]

[2] This note will be limited to the question of liability of the landlord to the tenant and to the tenant's social guests. The writer will not attempt to deal with such things as the so-called "business visitor" rule which governs liability for injury to an innocent third party who is on the premises at the invitation of the tenant where, at the time of making a lease for a public or semi-public purpose, conditions exist on the premises making them unfit for their intended purpose. As to the "business visitor" rule see Webel v. Yale Univ., 125 Conn. 515, 7 A.2d 215 (1939); Wood v. Prudential Ins. Co., 212 Minn. 551, 4 N.W.2d 617 (1942); Reese v. Piedmont, Inc., 240 N.C. 391, 82 S.E.2d 365 (1954); Prosser, *Business Visitors and Invitees,* 26 MINN. L. REV. 573 (1942).

[3] Uhlig v. Moore, 265 Ala. 646, 93 So. 2d 490 (1957); Penna v. Stewart, 78 Ariz. 272, 278 P.2d 892 (1955); Farber v. Greenberg, 98 Cal. App. 675, 277 Pac. 534 (1929); Newman v. Golden, 108 Conn. 676, 144 Atl. 467 (1929); Clerken v. Cohen, 315 Ill. App. 222, 42 N.E.2d 846 (1942); Richmond v. Standard Elkhorn Coal Co., 222 Ky. 150, 300 S.W. 359 (1927); Bushman v. Bushman, 311 Mo. 551, 279 S.W. 122 (1925); Goodall v. Deters, 121 Ohio St. 432, 169 N.E. 443 (1929); Oliver v. Cashin, 192 Va. 540, 65 S.E.2d 571 (1951); PROSSER, TORTS § 80 (2d ed. 1955); 52 C.J.S. *Landlord and Tenant* § 417 (1947); RESTATEMENT, TORTS §§ 355, 356 (1934).

[4] Penna v. Stewart, 78 Ariz. 272, 278 P.2d 892 (1955); Brooks v. Peters, 157 Fla. 141, 25 So. 2d 205 (1946); Oliver v. Cashin, 192 Va. 540, 65 S.E.2d 571 (1951).

[5] Uhlig v. Moore, 265 Ala. 646, 93 So. 2d 490 (1957); Rendall v. Pioneer Hotel, Inc., 71 Ariz. 10, 222 P.2d 986 (1950); Clerken v. Cohen, 315 Ill. App. 222, 42 N.E.2d 846 (1942); Mahnken v. Gillespie, 329 Mo. 51, 43 S.W.2d 797 (1931); Corcione v. Ruggiere, 139 A.2d 388 (R.I. 1958); Oliver v. Cashin, 192 Va. 540, 65 S.E.2d 571 (1951); RESTATEMENT, TORTS §§ 355, 356 (1934); 52 C.J.S. *Landlord and Tenant* § 418 (1947).

[6] Robinson v. Thomas, 244 N.C. 732, 94 S.E.2d 911 (1956); Harril v. Sinclair Ref. Co., 225 N.C. 421, 35 S.E.2d 240 (1945); Mercer v. Williams, 210 N.C. 456,

This view, however, has not gone without criticism. Several writers have felt a need for protecting the large and ever-increasing "tenant" segment of our population by placing on the landlord a duty to repair.[7] Several factors have led to this view, among them the following: greater mobility of population resulting in greater use of the short-term lease, changes in construction principles necessitating larger financial outlays for repairs, and increased urbanization causing concentration of people in one dwelling.[8] The duty to repair has been placed on the landlord primarily through legislation. Such legislation has tended to fall into three basic classes: (1) statutes requiring the landlord to repair and imposing a penalty for his failure to do so;[9] (2) statutes requiring the landlord to repair and providing that if he fails to do so the tenant may deduct the cost of repairs from the rent or terminate the contract;[10] (3) statutes requiring the landlord to repair and imposing tort liability for personal injuries arising because of his failure to do so.[11] The courts are not in agreement as to whether statutes of classes (1) and (2) place tort liability on the non-repairing landlord. Thus, of the jurisdictions having a class (1) type statute, some hold that the common law has been abrogated by the statute and that the landlord is liable for negligent failure to repair,[12] while others hold that, even though the landlord has the duty to repair, he is not liable for personal injury.[13] Those jurisdictions having a class (2) type statute uniformly hold that the landlord is not liable for personal injuries arising from violation of his statutory duty.[14] Of course, in those jurisdictions having a class (3) type statute the courts hold that the landlord is subject to liability for

187 S.E. 556 (1936); Williams v. Strauss, 210 N.C. 200, 185 S.E. 676 (1936); Salter v. Gordon, 200 N.C. 381, 157 S.E. 11 (1931); Hudson v. Singleton Silk Co., 185 N.C. 342, 117 S.E. 165 (1923); Fields v. Ogburn, 178 N.C. 407, 100 S.E. 583 (1919).

[7] Michaels v. Brookchester, Inc., 26 N.J. 379, 140 A.2d 199 (1958); 1 AMERICAN LAW OF PROPERTY § 3.78 (Casner ed. 1952); Comments, 41 GEO. L.J. 115 (1952), 62 HARV. L. REV. 669 (1949).

[8] *Ibid.*

[9] CONN. GEN. STAT. REV. §§ 19-343, -344 (1958); IOWA CODE ANN. §§ 413.66, .108 (1949); MASS. ANN. LAWS ch. 144 §§ 66, 89 (1957); MICH. STAT. ANN. §§ 5.2843, .2873 (1958); N.J. STAT. ANN. §§ 55:7-1, :11-3 (1940); N.Y. MULT. DWELL. LAW § 78; WIS. STAT. ANN. §§ 101.06, .28 (1957).

[10] CAL. CIV. CODE § 1941; MONT. REV. CODE ANN. § 42-201 (1947); N.D. REV. CODE § 47-1612 (1943); OKLA. STAT. ANN. tit. 41, § 32 (1954); S.D. CODE § 38.0409 (1939).

[11] GA. CODE ANN. §§ 61-111, -112 (1937); LA. CIV. CODE ANN. art. 2693 (1952); LA. REV. STAT. § 9:3221 (1951).

[12] Annis v. Britton, 232 Mich. 291, 205 N.W. 128 (1925); Michaels v. Brookchester, Inc., 26 N.J. 379, 140 A.2d 199 (1958).

[13] Chambers v. Lowe, 117 Conn. 624, 169 Atl. 912 (1933); Johnson v. Carter, 218 Iowa 587, 255 N.W. 864 (1934).

[14] Armstrong v. Zibell, 98 Cal. App. 2d 296, 219 P.2d 812 (1950); Dier v. Mueller, 53 Mont. 288, 163 Pac. 466 (1917); Staples v. Baty, 206 Okla. 288, 242 P.2d 705 (1952).

personal injuries arising from his failure to repair.[15] It appears that a few jurisdictions, without the aid of a statute, have imposed a duty on the landlord to exercise due care in keeping the premises reasonably safe and have held him liable for injuries resulting from the breach of this duty.[16]

Breach of Covenant To Repair

Most American writers say that the majority of Amercian jurisdictions hold, in accord with the common law rule, that where the landlord covenants to repair but fails to do so he will not be held liable for personal injuries arising from such failure.[17] Courts adhering to this view hold that the landlord is not liable in tort or in contract.[18] The reason for denying recovery in tort is generally that the mere reservation of a right to enter to make repairs does not in itself give the landlord the degree of control necessary for imposing a legal duty.[19] The same courts conclude that no contract liability for personal injuries arises because such damages cannot be said to have been fairly within the contemplation of the parties at the time that they entered into the contract.[20] Thus, the only cause of action is one arising in favor of the tenant for breach of the contract with damages limited to the cost of repairs or the depreciation in the value of the property.[21] Since the landlord is not liable in tort or contract for personal injuries, it follows, and the courts adhering to this view so hold, that those persons other than the tenant[22]

[15] Kleinberg v. Lyons, 39 Ga. App. 774, 148 S.E. 535 (1929).

[16] Snyder v. I. Jay Realty Co., 53 N.J. Super. 336, 147 A.2d 572 (1958); Skupienski v. Macy, 27 N.J. 240, 142 A.2d 220 (1958); see also Neilson v. Barclay Corp., 255 F.2d 545 (D.C. Cir. 1958).

[17] 2 HARPER & JAMES, TORTS § 27.16 (1956); PROSSER, TORTS § 80 (2d ed. 1955); Note, 10 N.C.L. REV. 397 (1932).

[18] Willis v. Snyder, 190 Iowa 248, 180 N.W. 290 (1920); Murrell v. Crawford, 102 Kan. 118, 169 Pac. 561 (1917); Huey v. Barton, 328 Mich. 584, 44 N.W.2d 132 (1950); Lahtinen v. Continental Bldg. Co., 339 Mo. 438, 97 S.W.2d 102 (1936); Cullings v. Goetz, 256 N.Y. 287, 176 N.E. 397 (1931); Timmons v. Williams Wood Prod. Corp., 164 S.C. 361, 162 S.E. 329 (1931); Note, 10 N.C.L. REV. 397 (1932). Cavalier v. Pope [1906] A.C. 428.

[19] Cullings v. Goetz, 256 N.Y. 287, 176 N.E. 397 (1931); Timmons v. Williams Wood Prod. Corp., 164 S.C. 361, 162 S.E. 329 (1932); PROSSER, TORTS § 80 (2d ed. 1955); 52 C.J.S. *Landlord and Tenant* § 417 (1947).

[20] Lahtinen v. Continental Bldg. Co., 339 Mo. 438, 97 S.W.2d 102 (1936); Arnold v. Clark, 45 N.Y. Super. Ct. (13 Jones and S.) 252 (1879); Timmons v. Williams Wood Prod. Corp., 164 S.C. 361, 162 S.E. 329 (1932); 2 HARPER & JAMES, TORTS § 27.16 (1956); 52 C.J.S. *Landlord and Tenant* § 417 (1947).

[21] Murrell v. Crawford, 102 Kan. 118, 169 Pac. 561 (1917); Arnold v. Clark, 45 N.Y. Super. Ct. (13 Jones and S.) 252 (1879); Timmons v. Williams Wood Prod. Corp., 164 S.C. 361, 162 S.E. 329 (1932); 2 HARPER & JAMES, TORTS § 27.16 (1956); 52 C.J.S. *Landlord and Tenant* § 417 (1947).

[22] The scope of the term "tenant" is not readily ascertainable from the cases. Strictly construed, "tenant" does not include members of the lessee's family, and some courts so hold. Timmons v. Williams Wood Prod. Corp., 164 S.C. 361, 162 S.E. 329 (1932); Cavalier v. Pope, [1906] A.C. 428. Other courts have included the family within the scope of the term. Kimmons v. Crawford, 92 Fla. 652,

injured because of the disrepair are also precluded from recovery.[23] North Carolina is in accord with this view. In *Jordan v. Miller*,[24] where the landlord breached a covenant to repair and an employee of the tenant was injured because of the disrepair of the premises, the court said that a tenant, his family, servants, or guests personally injured because of a defect in the premises, existing because of the landlord's failure to comply with his agreement to repair, may not recover indemnity from the landlord, since such damages are too remote and cannot be said to be fairly within the contemplation of the parties.[25]

It appears, however, that non-liability is by no means the prevailing view in this country. On the contrary, an increasing number of jurisdictions have come to hold the landlord liable in tort or in contract for personal injuries resulting from his breach of a covenant to repair. Generally these courts hold the landlord liable in tort on the theory that his duty to act is fixed by the contract.[26] However, even among the courts which hold the landlord liable for personal injury on a tort theory, there is no uniformity as to the requisites of such action. Thus, some courts hold that in order for a duty to be imposed on the landlord the contract must be such that he promises to keep the premises *safe*.[27] One court holds that the agreement must be one to make specific repairs and must be supported by consideration.[28] It is usually held that in

109 So. 585 (1926); Fried v. Buhrmann, 128 Neb. 590, 259 N.W. 512 (1935). As the text indicates, the distinction is of no practical consequence in this situation.

[23] Huey v. Barton, 328 Mich. 584, 44 N.W.2d 132 (1950); Timmons v. Williams Wood Prod. Corp., 164 S.C. 361, 162 S.E. 329 (1932); Cavalier v. Pope, [1906] A.C. 428; PROSSER, TORTS § 80 (2d ed. 1955).

[24] 179 N.C. 73, 101 S.E. 550 (1919).

[25] *Accord,* Moss v. Hicks, 240 N.C. 788, 83 S.E.2d 890 (1954); Leavitt v. Twin County Rental Co., 222 N.C. 81, 21 S.E.2d 890 (1942); Tucker v. Park Yarn Mill Co., 194 N.C. 756, 140 S.E. 744 (1927).

[26] Sanderson v. Berkshire-Hathaway, Inc., 245 F.2d 931 (2d Cir. 1957); Collision v. Curtner, 141 Ark. 122, 216 S.W. 1059 (1919); Singer v. Eastern Columbia, Inc., 72 Cal. App. 2d 402, 164 P.2d 531 (1945); Dean v. Hershowitz, 119 Conn. 398, 177 Atl. 262 (1935); Alaimo v. Du Pont, 4 Ill. App. 2d 85, 123 N.E.2d 583 (1954) (employee); Warebury v. Riss & Co., 169 Kan. 271, 219 P.2d 673 (1950) (workman's compensation); Cornelio v. Viola, 161 So. 196 (La. App. 1935); Patten v. Bartlett, 111 Me. 409, 89 Atl. 375 (1914); McKenzie v. Egge, 207 Md. 1, 113 A.2d 95 (1955); Crowe v. Bixby, 237 Mass. 249, 129 N.E. 443 (1921); Keegan v. G. Heileman Brewing Co., 129 Minn. 496, 152 N.W. 877 (1915); Hodges v. Hilton, 173 Miss. 343, 161 So. 686 (1935); Fried v. Burhmann, 128 Neb. 590, 259 N.W. 512 (1935); Michaels v. Brookchester, Inc., 26 N.J. 379, 140 A.2d 199 (1958); Ashmun v. Nichols, 92 Ore. 223, 180 Pac. 510 (1919); Merchant's Cotton Press & Storage Co. v. Miller, 135 Tenn. 187, 186 S.W. 87 (1916); Pollack v. Perry, 217 S.W. 967 (Tex. Civ. App. 1920), *rev'd on other grounds,* 235 S.W. 541 (Tex. Comm. App. 1921); Johnson v. Dye, 131 Wash. 637, 230 Pac. 625 (1924); Flood v. Pabst Brewing Co., 158 Wis. 626, 149 N.W. 489 (1914).

[27] Sanderson v. Berkshire-Hathaway, Inc., 245 F.2d 931 (2d Cir. 1957); Alaimo v. Du Pont, 4 Ill. App. 2d 85, 123 N.E.2d 583 (1954); Crowe v. Bixby, 237 Mass. 249, 129 N.E. 433 (1921); Ashmun v. Nichols, 92 Ore. 223, 180 Pac. 510 (1919); Lommori v. Milner Hotels, Inc., 63 N.M. 342, 319 P.2d 949 (1957) (dictum).

[28] Hodges v. Hilton, 173 Miss. 343, 161 So. 686 (1935).

order for the landlord to be liable he must have notice of the disrepair and have a reasonable time in which to correct it.[29] On the other hand, some courts hold that the landlord has a duty to make a reasonable inspection.[30] The reason usually given for imposing tort liability is that by a covenant to repair the landlord reserves control of the premises for that purpose and that such reservation of control is sufficient basis for imposing a legal duty to repair.[31] It is suggested that the courts would be on firmer ground if they simply stated the policy reasons for holding the landlord.[32] Indeed, most courts fail to mention either control or policy, simply saying that the landlord's duty to act is fixed by the contract, and, applying general negligence principles, hold him liable.[33] Thus, in a Connecticut case where the landlord breached his covenant to repair and the tenant was injured because of the disrepair of the premises, the court held the landlord liable saying that the covenant imposed a duty on him to exercise a certain degree of care to avoid injury to others. The court stated that this duty arises where one is by circumstances placed in such a position with regard to another that anyone of ordinary sense who did think would at once know that if he did not use ordinary care in regard to those circumstances danger of injury to the other would result.[34] These courts have had no difficulty in extending the landlord's liability to the guests of the tenant,[35] though,

[29] Alaimo v. Du Pont, 4 Ill. App. 2d 85, 123 N.E.2d 583 (1954); McKenzie v. Egge, 207 Md. 1, 113 A.2d 95 (1955); Ashmun v. Nichols, 92 Ore. 223, 180 Pac. 510 (1919).

[30] Crowe v. Bixby, 237 Mass. 249, 129 N.E. 433 (1921); Glassman v. Martin, 196 Tenn. 595, 269 S.W.2d 908 (1954); Johnson v. Dye, 131 Wash. 637, 230 Pac. 625 (1924).

[31] Smith v. Housing Authority, 144 Conn. 13, 127 A.2d 45 (1956); Patten v. Bartlett, 111 Me. 409, 89 Atl. 375 (1914); Flood v. Pabst Brewing Co., 158 Wis. 626, 149 N.W. 489 (1914). The New York Court of Appeals has relaxed the rule of a leading case, Cullings v. Goetz, 256 N.Y. 287, 176 N.E. 397 (1931), which held that a covenant to repair did not impose a legal duty on the landlord, to the extent that a covenant to repair with reservation of the right to inspect the premises gives sufficient control to the landlord to make him liable in tort. De Clara v. Barber S.S. Lines, Inc., 309 N.Y. 620, 132 N.E.2d 871 (1956), 23 BROOKLYN L. REV. 142 (1957).

PROSSER, TORTS § 80 (2d ed. 1955), states that these courts indulge in a legal fiction in saying that a covenant to repair gives the landlord control of the premises since he does not have the right to admit and exclude visitors.

[32] See Michaels v. Brookchester, Inc., 26 N.J. 379, 140 A.2d 199 (1958), where the court says that, while the common law principle of non-liability for failure to repair was suitable for the agrarian setting in which it was conceived, to adhere to it now is to lag behind changes in dwelling habits and economic realities.

[33] Dean v. Hershowitz, 119 Conn. 398, 177 Atl. 262 (1935); Keegan v. G. Heileman Brewing Co., 129 Minn. 496, 152 N.W. 877 (1915); Ashmun v. Nichols, 92 Ore. 223, 180 Pac. 510 (1919); Merchant's Cotton Press & Storage Co. v. Miller, 135 Tenn. 187, 186 S.W. 87 (1916).

[34] Dean v. Hershowitz, 119 Conn. 398, 177 Atl. 262 (1935).

[35] Singer v. Eastern Columbia, Inc., 72 Cal. App. 2d 402, 164 P.2d 531 (1945); Patten v. Bartlett, 11 Me. 409, 89 Atl. 375 (1914); Crowe v. Bixby, 237 Mass. 249, 129 N.E. 433 (1921); Merchants' Cotton Press & Storage Co. v. Miller, 135 Tenn. 187, 186 S.W. 87 (1916) (employee); Flood v. Pabst Brewing Co., 158 Wis. 626, 149 N.W. 489 (1914).

since the duty is fixed by the contract, it would seem that an argument could be made that his duty is limited to the tenant.[36]

A few courts have refused to recognize a landlord's tort liability but have held that he may be liable for personal injury in contract.[37] However, the ordinary rules of contract damages are applied, *i.e.*, the landlord must have contemplated that personal injuries were likely to result from the breach as a natural consequence thereof or must have been on notice of such likelihood at the time the contract was made.[38] Note that the only difference in the reasoning of these courts and that of those which deny recovery for personal injury in contract is that the latter refuse to recognize that personal injuries may be foreseeable under the circumstances when the contract was made. It would seem arguable that, since these courts apply the strict contract rules of damages, persons other than the tenant who were injured would be barred by lack of privity.[39] However, such a holding should not absolve the landlord entirely; if a third party is injured and such injury was foreseeable at the time the contract was made, then, in the event that the tenant is held liable to the third party in a suit for damages, the tenant's loss should be held to have been foreseeable by the landlord and the landlord should be held liable to the tenant in contract.

Where the Landlord Is Negligent in Making Repairs

The majority of American jurisdictions hold the landlord liable for personal injuries to the tenant[40] or a third person[41] which are caused by negligent repairs, whether performed gratuitously[42] or pursuant to a

[36] For an example of a court which has recognized the existence of this problem see Colligan v. 680 Newark Ave. Realty Corp., 131 N.J.L. 520, 37 A.2d 206 (1944).

[37] Busick v. Home Owners Loan Corp., 91 N.H. 257, 18 A.2d 190 (1941). In O'Neil v. Brown, 158 Ky. 118, 164 S.W. 315 (1914), the Kentucky court said in a dictum that any action must be on the contract, and ordinarily personal injuries are beyond the contemplation of the parties; however, under Hadley v. Baxendale, 9 Exch. Rep. 941, 156 Eng. Rep. 145 (1854), if notice is given, the boundaries of natural consequence may be enlarged.

[38] Busick v. Home Owners Loan Corp., *supra* note 37; O'Neil v. Brown, *supra* note 37.

[39] *But see* Busick v. Home Owners Loan Corp., 91 N.H. 257, 18 A.2d 190 (1941), holding the landlord liable in contract to the tenant's wife. *Quaere:* whether the court considered the tenant's family within the scope of the term "tenant." See the discussion of the conflict of reasoning as to scope of the term "tenant" at note 22 *supra*. At any rate, it seems that the tenant's family could be considered third party beneficiaries more readily than could a social guest.

[40] Nelson v. Myers, 94 Cal. App. 66, 270 Pac. 719 (1928); Lasky v. Rudman, 337 Mo. 555, 85 S.W.2d 501 (1935); Verplanck v. Morgan, 90 N.E.2d 872 (Ohio App. 1948).

[41] Kimmons v. Crawford, 92 Fla. 652, 109 So. 585 (1926); Barman v. Spencer, 49 N.E. 9 (Ind. 1898). Barrod v. Liedoff, 95 Minn. 474, 104 N.W. 289 (1905); Wilcox v. Hines, 100 Tenn. 524, 45 S.W. 781 (1898).

[42] Roesler v. Liberty Nat'l Bank, 2 Ill. App. 2d 54, 118 N.E.2d 621 (1954); Miller v. Howard, 206 Md. 148, 110 A.2d 683 (1955); Lasky v. Rudman, 337 Mo.

covenant to repair.[43] There are, however, differences in the reasoning of the courts on this matter. North Carolina appears to be in accord with the majority in holding the landlord for simple misfeasance once he undertakes to repair pursuant to a covenant,[44] though there is some question whether there can be a recovery where the repairs are gratuitous.[45] In *Hill v. Day*,[46] where the landlord negligently repaired and a sub-lessee, who had no knowledge of the repairs, was injured, the Maine court held that before one can recover for injuries resulting from negligent performance of a gratuitous undertaking he must prove reliance on a condition of safety which he believed was created by the landlord's action. The Massachusetts court has held that if the repairs are gratuitously made then only the tenant can recover and he can recover only if the landlord has been grossly negilgent.[47] Still another view is that the landlord's act must have left the premises in a more dangerous condition after the repairs than they were before the landlord acted.[48]

CONCLUSION

It appears that the majority of American jurisdictions hold that the landlord is not liable for negligent failure to repair if there is no covenant to repair and no statute imposing a duty on him to do so. Even if there is a statute, most courts do not hold him liable for personal injuries caused by the violation thereof. However, if there is a covenant to repair, there appears to be a growing majority of jurisdictions which hold the landlord liable for injuries resulting from the breach thereof. Also, if the landlord does attempt to repair and does the work negligently, the courts are almost unanimous in holding the landlord liable for injuries resulting to the tenant or his guest.

555, 85 S.W.2d 501 (1935); Verplanck v. Morgan, 90 N.E.2d 872 (Ohio App. 1948).

[43] Donahoo v. Kress House Moving Corp., 25 Cal. App. 2d 237, 153 P.2d 349 (1944); Barman v. Spencer, 40 N.E. 9 (Ind. 1898); Ginsberg v. Wineman, 314 Mich. 1, 22 N.W.2d 49 (1946); Bloecher v. Duerbeck, 333 Mo. 359, 62 S.W.2d 553 (1933); Crane Co. v. Sears, 168 Okla. 603, 35 P.2d 916 (1934) (employee); McCourtie v. Bayton, 159 Wash. 418, 294 Pac. 238 (1930) (housekeeper's son).

[44] Livingston v. Essex Inv. Co., 219 N.C. 416, 14 S.E.2d 489 (1941).

[45] In Livingston v. Essex Inv. Co., *supra* note 44, the court said that the landlord is not liable for personal injuries caused by defects in the premises *unless there is a covenant to repair* which he negligently performs. The court, however, by way of dictum, quotes from 16 R.C.L. *Landlord and Tenant* § 565 (1917), to the effect that gratuitous repairs negligently performed render the landlord liable. The writer has found no North Carolina holding involving gratuitous repairs.

[46] 108 Me. 467, 81 Atl. 581 (1911); *accord,* Kuchynski v. Ukryn, 89 N.H. 400, 200 Atl. 416 (1938).

[47] McDermott v. Merchants Co-op. Bank, 320 Mass. 425, 69 N.E.2d 675 (1946).

[48] Kuchynski v. Ukryn, 89 N.H. 400, 200 Atl. 416 (1938); *accord,* RESTATEMENT, TORTS § 362 (1934). *Contra,* Roesler v. Liberty Nat'l Bank, 2 Ill. App. 2d 54, 118 N.E.2d 621 (1954); Verplanck v. Morgan, 90 N.E.2d 872 (Ohio App. 1948).

The North Carolina court holds the landlord liable only when he undertakes repairs and makes them negligently. It is suggested that it would be wise for both court and legislature to give careful consideration to the social and economic conditions existing in this state, particularly its low per capita income and increasingly crowded housing conditions. Both of these facts are so well known that they are worthy of judicial notice, and they seem compelling reasons for revision in this area of the law. However, it is submitted that any change, to be effective, must impose on the landlord the duty to repair, regardless of covenant, because the tenants who need this protection lack bargaining power to secure covenants to repair from the landlord.

JAMES Y. PRESTON